FARQUHARSON *v.* KING.[1]

Importers left their goods with a dock-company, and as sales were made gave delivery orders to the purchasers. Their clerk, having express authority to sign these delivery-orders, executed one in favor of a fictitious person, and the dock-company acting upon it transferred the goods in accordance with the order. Afterwards the clerk sold the goods (using the fictitious name) to an innocent purchaser and pocketed the money. Who is to lose?—the importers or the purchaser? The opinion of a majority of the Court of Appeal was in favor of the purchaser, and with that decision the present writer (if he may be permitted to say so) is inclined to agree. It is for the purpose of making some suggestions as to the reasons given for the opinion of the court that he writes.

A. L. Smith, M. R., proceeded upon the Lickbarrow *v.* Mason rule:

"Where one of two innocent persons must suffer by the acts of a third person, he who has enabled such third person to occasion the loss must sustain it";[2]

with this qualification, however, that

"the act which has enabled the third person to occasion the loss must . . . be connected with the fraud which has caused injury to one of those two persons, in the sense of bringing about the fraud."

Vaughan Williams, L. J., agreed in the result but said:

"It is impossible, in the face of the authorities, to say that 'whenever one of two innocent persons'" &c.[3] "The conclusion I have come to is that one of two innocent parties ought never so be said to have within the meaning of the rule enabled a third person to commit a fraud, unless the act he has done is an act intended to be acted upon by somebody."[4]

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[1] [1901] 2 K. B. 697; 70 L. J. K. B. 985. [The case was discussed editorially in 2 COLUMBIA LAW REVIEW, 44.—Ed.] [2] 2 T. R. 63, 70.

[3] This had already been observed. See *per* Coleridge, C. J., in Arnold *v.* Cheque Bank (1876) 1 C. P. D. 587; 45 L. J. C. P. 562; and *per* Lord Field in Bank of England *v.* Vagliano [1891] A. C. 169; 60 L. J. Q. B. 177.

[4] The learned judge might have cited in support of this view the language of Wills, J.: "The foundation, however, of the whole thing is that the agent should be authorized to enter some transaction." Biggs *v.*

"In my opinion the sale to the defendants (the purchaser) was a dealing with the timber in pursuance of the power, although not in pursuance of the authority, and I think that that consideration is sufficient to bring the case within the principle" in Lickbarrow *v.* Mason.

Both judgments proceed upon the well-known Lickbarrow *v.* Mason rule, but each proposes a different qualification of it.

Bearing in mind the distinction between ostensible ownership and ostensible agency as a ground of estoppel of the true owner, the significance of the suggestion of Vaughan Williams, L. J. (to take his first), is that the true owner will be estopped only in cases in which, having enabled the person who committed the fraud (let us call him the rascal) to appear as owner or agent, he did so *with the intention that someone should act upon that appearance.* To test this let us examine its application to ostensible agency and ostensible ownership separately.

OSTENSIBLE AGENCY.

Ostensible agency may, for the sake of exposition at least, be divided into two kinds: (1) appearance of agency, when there is no agency at all; and (2) appearance of greater authority in an agent than that which he really has —in other words, there may be a misleading appearance as to (1) the existence of agency, and (2) the extent of agency.[1]

Extent of Agency. Very many of the cases of estoppel by ostensible agency fall within this latter subdivision. The circumstances are that between the true owner and the rascal there is some relation of principal and agent; that the rascal has exceeded his authority; and that the principal is estopped because he has enabled the rascal to appear to have authority to do the act in question. For example, a mercantile agent is given documentary power to draw upon his principals, whereas his instructions and his real authority are to draw only as against any advances which he may make in respect of purchases for his principals;[2]

Evans [1894] 1 Q. B. 89. That learned judge, however, did not (as is submitted) sufficiently distinguish between ostensible ownership and ostensible agency, nor between the different sorts of ostensible agency. See *post*; and also Ewart on Estoppel, p. 484 f.

[1] Ewart on Estoppel, 483–7.

[2] Montaignac *v.* Shitta (1890) 15 App. Cas. 362.

or an agent has power to sell goods and is told to sell only to persons who are "responsible and in first class credit";[1] or an agent is given power to purchase vegetables and is told to select those only which are ripe;[2] or a bank-teller is given power to certify cheques, and is told not to certify when there are no funds.[3] In this class of cases Vaughan Williams, L. J., would say that the reason for estoppel is that the principal intended *somebody* to act upon the power and therefore he ought to suffer; but we should much prefer to adopt the view of an American judge in a case[4] which was approved in the Privy Council[5]:

"It is a settled doctrine of the law of agency in this State, that where a principal has clothed his agent to do an act upon the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the powers is itself a representation, a third person dealing with such agent in entire good faith pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice."

We would say with Lord Herschell, in another case, that, if an agent has power to borrow, for example, upon the happening of some extrinsic event,

"their Lordships do not think it was incumbent upon the lender to inquire whether in the particular case the emergency had arisen or not."[6]

In this particular class of cases, then, it is true that the principal did intend *somebody* to act upon the power given to the agent, and the act done is, as Vaughan Williams, L. J., tersely puts it, "in pursuance of the power although not in pursuance of the authority." But it by no means follows that because in this particular class of cases the owner did intend that somebody should act and was estopped, therefore an owner will not be estopped in other cases in which he had no such intention.

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[1] Merrimac *v.* Illinois (1888) 30 Ill. App. 268; 21 N. E. 787.

[2] Baker *v.* Barnett (1897) 113 Mich. 533; 71 N. W. 866.

[3] Bank of Batavia *v.* New York Ry. (1887) 106 N. Y. 199.

[4] Bank of Batavia *v.* New York Ry. (1887) 106 N. Y. 199. Other examples may be found in Attwood *v.* Munnings (1827) 7 B. & C. 278; 1 Man. & Ry. 66; 6 L. J. K. B. O. S. 9; Alexander *v.* McKenzie (1848) 6 C. B. 766; 18 L. J. C. P. 94; Bryant *v.* La Banque du Peuple [1893] A. C. 180; 62 L. J. P. C. 73; Jarmain *v.* Hooper (1843) 6 M. & G. 850; 13 L. J. C. P. 66; Barwick *v.* English (1867) L. R. 2 Ex. 266; 36 L. J. Ex. 147. See also Shaw *v.* Port Philip (1884) 13 Q. B. D. 103; 53 L. J. Q. B. 369.

[5] Bryant *v.* La Banque du Peuple [1893] A. C. 180; 62 L. J. P. C. 73.

[6] Montaignac *v.* Shitta (1890) 15 App. Cas. 362.

He is estopped here because the act which his agent did appeared to be within his authority. The distinction is useful, but not clearly attended to, between estoppel of a principal, (*a*) when the agent acts within what appears to be his authority, and (*b*) when the agent appears to be acting within his authority. There may be appearance as to the extent of the real authority (*a*), or appearance as to the act being within the authority (*b*)—appearance in relation to the authority (*a*), or appearance in relation to the act (*b*). In the class of cases in hand the appearance is as to the act (*b*), namely that it was within the power, and for that reason there is estoppel.[1]

Existence of Agency. Let us turn now to cases in which there is no agency at all—in which the act done by the rascal is within neither power nor authority; in which the appearance is as to the authority (*a*) and not as to the act (*b*). For example, I send my horse to a sales-stable, upon the express understanding that he is not to be sold, but is there merely for the purpose of getting the benefit of the services of the veterinary; and the stable-proprietor fraudulently sells the horse. In such a case I by no means intend that any one should act upon the appearance of authority to sell. I intend the exact contrary of that. Nevertheless Lord Ellenborough would say:

"If a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be assumed that the apparent authority is the real authority." "If the principal send his commodity to a place where it is the ordinary business of the person to whom it is consigned to sell, it must be intended that the commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound and the purchaser safe".[2]

and one may be permitted to think that Vaughan Williams, L. J., were the case put to him, would concur in such language, although it is subversive of his recent *dictum.* It must be observed too that the case just suggested is but one

[1] Ewart on Estoppel, 501 f.

[2] Pickering *v.* Busk (1812) 15 East, 63. This language has been very frequently indorsed in America: Lausatt *v.* Lippincott (1821) 6 Serg. & R. 392; Towle *v.* Leavitt (1851) 23 N. H. 358; Taylor *v.* Pope (Tenn. 1868) 45 Cold. 416; Quinn *v.* Davis (1875) 78 Pa. St. 15; Spooner *v.* Cummings (1890) 151 Mass. 313; 23 N. E. 839; Lewenberg *v.* Hays (1897) 91 Me. 499; 39 Atl. 469; Atlanta *v.* Hunt (1897) 100 Tenn. 84; 49 S. W. 483; Heath *v.* Stoddart (1898) 91 Me. 499; 40 Atl. 547; Van Dusen *v.* Jungleblut (Minn. 1897) 77 N. W. 770.

of very many instances which fall within the firmly established principle of Cole *v.* North-Western Bank[1]:

'If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded * * * from denying that he had given such authority."

Nothing turns, it will be observed, upon whether the owner intended or did not intend that somebody should act upon what he had done. If indeed he dressed up the rascal as his agent, intending that people should be deceived, there can be no doubt that he would rightly suffer; the only question in such case would be whether we should have to go to estoppel at all for a reason for so holding—the law of agency probably sufficing. And if he dressed up the rascal intending that nobody should be deceived, but finds that good (or bad) use has been made of the clothes, should not he suffer rather than the innocent dupe?

OSTENSIBLE OWNERSHIP.

And the result is the same where the permitted appearance is that of ownership, rather than of agency. For example, "If a wine merchant be left in possession of wine," Bramwell, L. J., would say that

"the fair inference is that it is his own, and a person may be justified in advancing money upon the security of it."[2]

The principle is the same as that applied in another case by Lord Herschell:

"If the owner of a chose in action clothes a third party with the apparent ownership and right of disposition of it, he is estopped from asserting his title as against a person to whom such third party has disposed of it, and who received it in good faith and for value."[3]

Here again it is quite immaterial whether the true owner intended somebody to act upon what he has done. Indeed were it necessary to go so far it could be shown that estoppel may attach not only where there was no intention that any one should change his position because of

[1] (1875) L. R. 10 C. P. 362; 44 L. J. C. P. 236.

[2] Meggy *v.* Imperial (1878) 3 Q. B. D. 717. And see 47 L. J. Q. B. 119. It would be quite different, as the learned judge points out, were one man's furniture left in another man's house. There is, in that case, no misleading appearance of ownership: see Ewart on Estoppel, Cap. XXI.

[3] Colonial Bank *v.* Cady (1890) 15 App. Cas. 285; 60 L. J. Ch. 141.

the act done, but also where there was no intention to do the act itself:

"The rule is that if a man so conduct himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists and acts on the inference, he shall be afterwards estopped from denying it."[1]

"It is a familiar rule that if the owner, although induced thereto by fraud, invests another with the apparent legal title to chattels, in pursuance of a contract, the person so clothed may transfer an unimpeachable title to a good faith purchaser."[2]

THE CASE IN HAND.

Classification being now completed there is little difficulty in assigning the case in hand to its proper place. The dissenting judge, Stirling, L. J., treats it as belonging to the ostensible-agency class. He says that

"the only question is whether the case is within the exception" that "if the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded," etc.

There was of course no such element in the case for there was not, to the purchaser, any appearance of agency at all or of authority to sell, and the learned judge therefore, although unwillingly, acquits the owner of legal blame. But the case (with submission) has nothing to do with ostensible-agency. It is, although a little complicated, a case of ostensible-ownership, and the reasoning applicable to it is this: If the owner had clothed the clerk with the apparent ownership, and the clerk had sold to an innocent purchaser, the owner would have been estopped; and the result is the same if the owner enabled the clerk to assume the appearance of ownership. The difference between giving to another an appearance of ownership or authority, and enabling that other to assume such appearance, is in

[1] Cornish *v.* Abington (1859) 4 H. & N. 556; 28 L. J. Ex. 262; and see Sheppard *v.* Union Bank (1862) 31 L. J. Ex. 154; Baines *v.* Swainson (1863) 32 L. J. Q. B. 281.

[2] Moore *v.* Moore (1887) 112 Ind. 152; 13 N. E. 673. And see Kingsford *v.* Merry (1856) 11 Ex. 577; 1 H. & N. 503; 25 L. J. Ex. 166; Pease *v.* Gloahec (1866) L. R. 1 P. C. 229; 25 L. J. P. C. 166; Babcock *v.* Lawson (1880) 5 Q. B. D. 284; 49 L. J. Q. B. 408; Root *v.* French (1835) 13 Wend. 570, approved in Henderson *v.* Williams (1895) 1 Q. B. 529; 64 L. J. Q. B. 308; Trustees *v.* Smith (1890) 118 N. Y. 640; 23 N. E. 1002; Brant *v.* Virginia (1876) 93 U. S. 327; Ewart on Estoppel, 302 f.

the law of estoppel quite immaterial. The question must be looked at from the purchaser's side: Here is a man[1] who appears to own these goods; the true owner did that which enabled the man to present such an appearance; therefore the true owner should lose.

SUGGESTED SOLUTION.

But we must, if possible, get at some working principle. If we cannot say that an owner is not to be estopped unless he intended that somebody should act upon what he had done; and if, on the other hand, the sweeping proposition that "wherever one of two innocent persons must suffer by the acts of a third person, he who has enabled," etc., cannot be supported, where ought the line to be drawn?

In a book issued about a year ago (which has been very well received in the United States, and quite neglected in England), the present writer formulated a principle of "estoppel by assisted misrepresentation," of which, as he thinks, the Lickbarrow *v.* Mason rule was an early precursor, stated too broadly and lacking in precision. That a man may be estopped by his own misrepresentation is very familiar law. And for the proposition that he may be also estopped by the misrepresentation of another person, if he has assisted it, there are hundreds of authorities. But the reduction of those cases (examples of which are to be found in almost every department of the law) to a common basis, and the application to all of them of one principle or set of principles was not undertaken until recently. The writer has suggested:

"that one man may be estopped by a misrepresentation made by another, when the former, in breach of some duty to the deceived person, has supplied the defrauder with that which was necessary to make the representation credible. If the fraud was accomplished without assistance, there can, of course, be no estoppel (of any one but the defrauder). If although there

[1] That the clerk was operating under an assumed name may be of some importance. Had the clerk used his power to transfer the goods to an accomplice, who then sold to an innocent purchaser, the estoppel of the owner would have been very apparent, and would probably not have been questioned. The use of a fictitious name instead of a real accomplice leaves open the argument that the purchaser himself contributed to the success of the fraud by the omission of inquiries as to the identity of his vendor. Did he, too, assist the misrepresentation? Is the case one of contributory negligence, as it were? Can the purchaser put all the blame on the importer?

was assistance, yet if the assistance was an immaterial factor in the accomplishment of the fraud, there ought likewise to be no estoppel—the assistance did not furnish the occasion or the opportunity for the fraud. But if the assistance was in some way essential to the success of the fraud—furnished the occasion or opportuuity for it; made credible a representation which without it would not have been successfully made—then, if there has been a breach of some duty in rendering the assistance, estoppel will ensue."[1]

For example, a mortgagor falsely representing himself as the owner of unencumbered property conveys it to an innocent purchaser, and the position of the mortgagee is unaffected, for he has in no way assisted the misrepresentation, and the purchaser has but himself to blame. Suppose however that the mortgagor, upon some trumped-up excuse, induces the mortgagee to hand over the deeds, and that with the help of these the misrepresentations of unencumbered ownership are made credible to the purchaser; the owner will be estopped because of the assistance rendered to the misrepresentation—he has done that which was ordinarily necessary to make it successful. So also in the classes of cases which we have already been considering: A man falsely representing himself as my agent makes a contract upon my behalf, and I, of course, am not bound. But if I have in some way held out the man as having my authority, I am estopped by the assistance rendered to the misrepresentation. And this doctrine can be successfully carried through all departments of the law to which the Lickbarrow *v.* Mason formula has seemed to be applicable —and there is no more ubiquitous rule.

Among other analyses of misrepresentation, then, as a ground of estoppel, it may be divided into (1) personal and (2) assisted misrepresentation; and assisted misrepresentation may be divided into cases of (*a*) passive and (*b*) active assistance. Without this classification it is impossible to answer the question which we have in hand; and without these distinctions no solution (as the present writer thinks) can be satisfactory.

Personal Misrepresentation. Supposing some person asks me a question and I give a false answer, but I have no notion that the questioner intends to change his position

[1] Ewart on Estoppel, 20, 21. Sufficient sources for the language employed are given in the note on p. 21.

upon the faith of the reply, am I estopped? An American judge has supplied a pithy answer:

"Certainly no one can be estopped by a deceptive answer to a question which he may rightly deem impertinent and propounded by a meddling intruder."[1]

And Lord Cranworth formulates the rule in this way:

"But if the party has unwittingly misled another, you must add that he has misled another under such circumstances, that he had reasonable ground for supposing that the person whom he was misleading was to act upon what he was saying."[2]

Baron Parke is much to the same effect:

"If whatever a man's real meaning may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the report would be equally precluded from contesting its truth."[3]

An American judge puts it in this form:

"If the circumstances are such that a reasonable man under the circumstances would anticipate that it was to be acted upon, that will be sufficient."[4]

Consideration of these and other authorities has induced the statement that, in cases of personal misrepresentation, estoppel will ensue only where the misrepresenter had "reasonable ground for anticipating some change of position as a result of his misrepresentation." It is not at all essential that he should have intended that action should follow his misrepresentation. It is quite sufficient "that he had reasonable ground for supposing" "that a reasonable man would anticipate, that it was to be acted upon," although as a matter of fact he never gave the subject a thought.

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[1] Pierce *v.* Andrews (1850) 60 Mass. 6. And see New Brunswick *v.* Conybeare (1862) 9 H. L. C. 726; 31 L. J. Ch. 297.

[2] Jorden *v.* Money (1854) 5 H. L. C. 212; 23 L. J. Ch. 865. And see West *v.* Jones (1851) 1 Sim. N. S. 205; 20 L. J. Ch. 362; Mangles *v.* Dixon (1852) 3 H. L. C. 702; Manufacturer's Bank *v.* Hazard (1864) 30 N. Y. 226; Wallerich *v.* Smith (1896) 97 Iowa 308; 66 N. W. 184; Moore *v.* Spiegel (1887) 143 Mass. 413; 9 N. E. 827.

[3] Freeman *v.* Cooke (1848) 2 Ex. 654; 18 L. J. Ex. 114. And see Preston *v.* Mann (1856) 25 Conn. 128, 129; Ford *v.* Fellows (1889) 34 Mo. App. 630; 8 S. W. 791; Daugherty *v.* Yates (1896) 13 Tex. Civ. App. 646; 35 S. W. 937; Sessions *v.* Rice (1886) 70 Iowa, 306; 30 N. W. 735.

[4] Two Rivers Co. *v.* Day (1899) 102 Wis. 328; 78 N. W. 442. And see Kingsman *v.* Graham (1881) 51 Wis. 232; 8 N. W. 181; Tracy *v.* Lincoln (1887) 145 Mass. 357; 14 N. E. 122.

Assisted Misrepresentation. The assistance rendered to a misrepresenter may, as has been said, be either (1) passive, or (2) active.

(1) Of the former class the most usual is the familiar case of standing-by, while some other person assumes to act as your agent or deal with your property. And it is well-settled law that in such cases the by-stander is estopped, if he "suffer another" to "act under an erroneous impression"[1]; if "perceiving his mistake" the by-stander should "abstain from setting him right"[2]; in other words if the by-stander had "reasonable ground for anticipating some change of position" as a result of his silence.

(2) A different rule has, however, to be formulated for cases where the assistance is of active character. For in these cases the estoppel-denier is usually quite as innocent as the estoppel asserter[3]; he does not make the misrepresentation and is unaware that it is being made; it is the rascal who makes it and who secretly uses such assistance as he has been supplied with to make it credible. For example, reverting to the case in which the mortgagee handed over the deeds to the mortgagor and found that they had been fraudulently deposited for a loan, it is evident that we cannot now say that estoppel will ensue if the mortgagee had "reasonable ground for anticipating some change of position as a result of his (or anybody's) misrepresentation"; for the mortgagee was not only quite innocent of the fraud, but had no intention whatever that anybody should change his position upon the faith of his complacency. He did not in fact anticipate any misrepresentation, and could not therefore have anticipated the result of it. For all cases of this class it is suggested that the true rule is

"that the change of position of the estoppel-asserter must have been reasonably consequent upon the assistance which has been rendered by the estoppel-denier."[4]

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[1] *Per* Chancellor Kent in Wendell *v.* Van Rensselaer (1815) 1 Johns. Ch. 344.

[2] *Per* Lord Cranworth in Ramsden *v.* Dyson (1866) L. R. 1 H. L. 140.

[3] The phrases estoppel-denier and estoppel-asserter save cumbrous descriptions of the actors in estoppel cases and are, it is thought, sufficiently apt and explicit to induce their adoption.

[4] Ewart on Estoppel, Cap. XIII.

For example, though the mortgagee (in the case just put) could not have anticipated that the mortgagor would deposit the title deeds instead of returning them as he had agreed; yet it may be said that the mortgagee in handing over the deeds did that which was "essential to the success of the fraud, furnished the occasion or opportunity for it, made credible a representation which without it could not have been successfully made," and that the change of position of the estoppel-asserter was therefore reasonably consequent upon the assistance rendered by the mortgagee. Application of this rule to the cases belonging to the class under consideration will recommend it to the profession:

Coventry *v.* G. E. Ry. Co.[1] A railway company by mistake issued a delivery order in respect of goods which it had not received; the plaintiff advanced money upon the faith of the representation of ownership by the holder of the order, assisted by the order itself; and the company was estopped from denying its possession of the goods. It is usual to act upon the faith of such documents. The advance was reasonably consequent upon the issue of the false certificate.

Re Bahia.[2] A company by mistake, or induced thereto by fraud, issued an erroneous certificate of shares; the holder aided by the certificate sold the shares, representing himself as entitled to them; and the company was estopped. Certificates are granted for the "more easily dealing with shares in the market." The purchase of them was reasonably consequent upon the issue of the certificate.

Lickbarrow *v.* Mason.[3] An unpaid vendor of goods shipped them to the purchaser and indorsed to him the bill of lading; the purchaser transferred the goods and the bill to an innocent subpurchaser; and the unpaid vendor was precluded from exercising his right of stoppage *in transitu*. It is usual to "give credit to the bill of lading." The subpurchase was reasonably consequent upon the transfer of the bill.

Waldron *v.* Sloper.[4] This is one of the mortgage cases

[1] (1883) 11, Q. B. D. 776; 52 L. J. Q. B. 696.

[2] (1868) L. R. 3 Q. B. 594; 37 L. J. Q. B. 181. [3] 2 T. R. 63.

[4] 1 Dr. 193. See also Clarke *v.* Palmer (1882) 21 Ch. D. 124; 51 L. J. Ch. 634; Newman *v.* Newman (1885) 28 Ch. D. 674; 54 L. J. Ch. 598.

above referred to. The mortgagee is estopped because he enabled the mortgagor to pose as unencumbered owner. The change of position upon the part of the subsequent depositee is reasonably consequent upon the equipment of the mortgagor with the ready apparatus for fraud.

Henderson *v.* Williams.[1] The owner of goods was fraudulently induced to instruct the warehouseman of them to transfer the goods to the name of the rascal, who thus equipped with evidence of title sold the goods. This sale was reasonably consequent upon the transfer to the rascal.

Johnson *v.* Credit Lyonnais.[2] A purchaser of goods buying at a dock left the dock-warrants with the vendor and took no steps to have any change made in the books of the dock-company as to the ownership of the goods; the vendor remaining thus equipped with the documents of title sold the goods a second time; it was held that the first purchaser was *not* estopped; but Parliament before the case was decided on appeal passed a statute declaring otherwise.[3] It was this authority that made all the difficulty in the case under review and led to the suggestion of Vaughan Williams, L. J., which we are now considering. The statute being unnoticed, the authority was got rid of by a distinction which was sufficient for the purpose but which would reverse very many cases usually believed to be quite unassailable.

Brocklesby *v.* Temperance.[4] Vaughan Williams, L. J., finds much support for his suggestion in this case. The owner of certain title deeds employed his son to raise money upon them, and at the same time directed him not to borrow more than a specified sum; the son obtained a loan of a larger amount from a person who knew of the power to borrow but was unaware of the limitation as to amount; and the lender was upheld in his claim for the

[1] (1894) 64 L. J. Q. B. 308; [1895] 1 Q. B. 521.

[2] (1877) 2 C. P. D. 224; 47 L. J. C. P. 241; 3 C. P. D. 32.

[3] 40 & 41 Vic. c. 39, s. 3. In commenting upon this case the present writer predicted that although it had been reversed by Parliament yet "the decision remains as a formidable obstacle should we again try to proceed upon principle." Ewart on Estoppel, 337.

[4] [1895] A. C. 173; 64 L. J. Ch. 433.

whole advance. The learned judge applied the case in this way:

"Suppose the father had merely intrusted the son with the deeds of the property and the son had fraudulently taken them and raised money on them, could it be said that the act of the father was within the rule? [That is the Lickbarrow *v.* Mason rule.] In my judgment it clearly could not have been said so, because the father would not upon the supposition have done any act which he intended to be acted upon * * * he did not intend the son to deal with the deeds at all."

The above method of stating this case seems to place it in the class already referred to, namely, that in which a wide power is given and some limitation as to its exercise is imposed—a class in which the agent acts within the power but not within the authority. In those cases (as has already been seen) it may very truly be said that the principal intended some body to act upon the power, but it does not at all follow that he may not be estopped in other cases in which he has no such intention.[1]

All the cases referred to by Vaughan Williams, L. J., as well as some others, have now been reviewed and the result is:

(1) The suggestion that the true owner will be estopped only when "the act he has done is an act intended to be

[1] The present writer is not at all satisfied, however, with this method of disposing of Brocklesby *v.* Temperance and he has (possibly with some temerity) suggested reasons for doubting the correctness of the decision itself. Suppose that the son had had authority to sign a note for £100; and misrepresenting his authority signed one for £500 and passed it off; no one would suggest that the father would be liable. The cases are exactly parallel—in both the lender must ascertain the extent of the agent's authority. Neither of them is a case in which the power is one thing and the authority another. Neither is a case of general power to do a series of acts with private instructions and limitations attached to the power. The House of Lords, in the Brocklesby *v.* Temperance case, was misled (as the present writer ventures to think) by a case in which a mortgagee handed over the title deeds to a mortgagor upon the understanding that £15,000 should be borrowed upon them; the mortgagor borrowed £50,000; and the lender was upheld, Lord Herschell saying: "I confess I am quite unable to see any distinction in principle between the two cases." But, with the highest respect for one of England's greatest judges, the distinction is that between ostensible ownership and ostensible agency. In the case last mentioned, the mortgagor having the deeds appeared to be the unincumbered owner of the property and could borrow what he pleased—the lender knew nothing of agency whatever and could not therefore inquire into extent of authority. In Brocklesby *v.* Temperance, however, the lender is approached by a man who says, "Here are my father's deeds. I am authorized to borrow £500 upon them." Why should not the usual rule apply here, that the extent of an agent's authority must be, at your peril, ascertained? If a principal has done anything to accredit an agent as having authority greater than that really assigned to him, that of course is another matter.

acted upon by somebody" is true of but one class of cases, and true there only because the class happens to be composed solely of instances in which such intention is one of the factors.

(2) There are other classes of cases in which estoppel ensues, although the act done by the true owner was not one "intended to be acted upon by somebody."

(3) The rule for cases of personal, and passively assisted, misrepresentation is that the true owner will be estopped when he had reasonable ground for anticipating some change of position as the result of the misrepresentation.

(4) The true rule for cases of actively assisted misrepresentation is that the change of position must have been reasonably consequent upon the assistance rendered by the estoppel-denier.

(5) These rules apply, of course, as well to cases of ostensible ownership as to cases of ostensible agency.

Qualification by the Master of the Rolls.

It will be remembered that the Master of the Rolls suggested that

> "the act which has enabled the third person to occasion the loss must * * * be connected with the fraud which has caused injury to one of those two persons in a sense of bringing about the fraud."

While reading the foregoing exposition, some readers have been dissenting from the applicability of the phrase "reasonably consequent upon the assistance rendered": Can it be said (they have thought) that the commission of a fraud is reasonably consequent upon the possession of means to accomplish it? In the case under review, for example, can it be asserted that the transfer of the goods to the fictitious name and the subsequent sale to an innocent purchaser were reasonably consequent upon the grant of power to sign delivery orders? They were certainly not a necessary consequence of the grant; and upon the other hand they were so connected with the grant that they could not have occurred without it. To use the language of the Master of the Rolls, the grant of the power was connected with the fraud "in the sense of bringing about the fraud."

If so, it may be said inversely that the fraud was the reasonable consequence of the grant of authority:

> "How oft the sight of means to do ill deeds,
> *Makes* ill deeds done."[1]

And the rule couched in language suggested thus receives confirmation from the case under review.

The learned judge furnishes further comfort to the present writer. Until his judgment, the language of Blackburn, J., in Swan *v.* North British—

"The neglect must be in the transaction itself and be the proximate cause of the leading the party into the mistake"[2]—

although found to be embarrassing,[3] was not recognized as imposing, in the classes of cases under review, an impossible prerequisite. The writer's book, indeed, had a sentence to the effect that such a rule "is an impossible one";[4] for the "neglect" in cases

"of assisted misrepresentation never can be the proximate cause of the leading of the person into the mistake. There is always interposed the misrepresentation of some third person."

The Master of Rolls, with more acceptance than the present writer could expect, and without any reference whatever to previous judicial difficulty, now says:

"With regard to the argument that it was the fraud of the clerk, and not the authority given to the dock company which was the proximate cause of the loss, the rule as to which of two innocent persons is to bear a loss only comes into play when a fraud has been committed; and if we are to give weight to the argument we might as well strike the rule altogether out of the law of England. I do not think that we ought to do so."

JOHN S. EWART.

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[1] King John, IV, 2. [2] 2 H. & C. 181; 28 L. J. Ex. 273.

[3] Seton *v.* Lafone (1887) 19 Q. B. D. 68; 56 L. J. Q. B. 415.

[4] Ewart on Estoppel, 119.